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No. 04-47

IN THE

Supreme Court of the United States

UNION PACIFIC RAILROAD CO.,

Petitioner,

v.

CHRIS BARBER, CLAUDETTE BARBER, AND ALLIED WASTE INDUSTRIES, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The Arkansas Supreme Court

BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

In this personal injury case arising from a grade crossing accident, the Arkansas Supreme Court affirmed a $25 million punitive damage award against Union Pacific on the theory that the company "prioritized monetary gain" over "personal safety," disregarding the fact that Union Pacific operated its train in conformance with the federal standards governing train speed.

Amicus will address the following questions:

1. Whether the Arkansas court misapplied the reprehensibility guidepost, and violated this Court's decision in *State Farm v. Campbell*, by disregarding Union Pacific's compliance with federal speed requirements and holding that Union Pacific acted with "a high degree of reprehensibility" based on a purported "corporate policy" of favoring profit over safety and its alleged litigation misconduct.

2. Whether the Arkansas court erred in upholding a 5:1 ratio of punitive to compensatory damages, despite this Court's holding in *State Farm* that "[w]hen compensatory damages are substantial," even a 1:1 ratio between punitive and compensatory damages "can reach the outermost limit of the due process guarantee."

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BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*[1]

The Product Liability Advisory Council, Inc. (PLAC) is a non-profit association with over 130 corporate members representing a broad cross-section of American and international product manufacturers. These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the leading product liability defense attorneys in the country are sustaining (non-voting) members of PLAC. Since 1983, PLAC has filed over 650 briefs as *amicus curiae* in both state and federal courts, including this Court, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product liability. A list of PLAC's corporate members is attached in the Addendum.

Because plaintiffs routinely seek punitive damages in product liability cases, the fair administration of punitive civil sanctions is an issue of great importance to product manufacturers, and PLAC has filed *amicus* briefs in this Court's three most recent decisions involving constitutional excessiveness challenges to punitive damage awards: *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996); *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S.

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[1] Pursuant to this Court's Rule 37.3(a), letters of consent from all parties to the filing of this brief have been filed with the Clerk. Pursuant to Rule 37.6, PLAC states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than PLAC or its counsel made a monetary contribution to the preparation or submission of this brief.

424 (2001), and *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003). As set forth below, PLAC believes that the constitutional limitations on such awards should be faithfully enforced, and manufacturers should not be punished for reasonable design decisions that were made in good faith and in conformance with federal safety standards and regulations.

STATEMENT

Respondent Chris Barber was injured when he was traveling in a garbage truck that was struck by a Union Pacific train at a grade crossing. Petitioner's Appendix ("Pet. App.") 1a-2a. A jury found Union Pacific negligent and awarded Mr. Barber and his wife $5.1 million in compensatory damages and $25 million in punitive damages. *Id.* at 1a.

The Arkansas Supreme Court affirmed, rejecting Union Pacific's challenge that the punitive damage award was unconstitutionally excessive under *State Farm v. Campbell*, 538 U.S. 408. *See* Pet. App. 29a-36a. Although a federal track inspector had testified that the track at the grade crossing was "Class 4" track safe for travel up to 60 miles per hour, and although it was undisputed that the Union Pacific train was traveling less than 60 miles per hour at the time of the collision, the court nonetheless held that Union Pacific's conduct "was indicative of a high degree of reprehensibility." *See* Pet. 4, Pet. App. 33a. The court stated that Union Pacific had a "corporate policy . . . that put company profits before public safety," asserting that "Union Pacific prioritized monetary gain over the personal safety of those crossing its train tracks." Pet. App. 30a, 32a. The court added that the punitive sanction was further warranted because Union Pacific allegedly engaged in litigation misconduct by "intentionally destroy[ing]" evidence. *Id.* at 32a.

The court held that a 5:1 ratio of punitive to compensatory damages was constitutionally permissible under *State Farm*. It asserted that "[t]he standard to be employed is whether the ratio is 'breathtaking,'" citing this Court's observation that "'[s]ingle-digit multipliers are more likely to com-

port with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in the range of 500 to 1, or of 145 to 1.'" Pet. App. 33a (quoting *State Farm*, 538 U.S. at 425 (ellipses omitted)). The court concluded that "[u]nder the circumstances of this case, a multiplier of 5 is justified." Pet. App. 33a.

SUMMARY OF ARGUMENT

The Arkansas Supreme Court misapplied and evaded the reprehensibility guidepost established in *State Farm* and *Gore* in ways that are becoming increasingly common in the lower courts, particularly in product liability cases involving personal injury. The court ignored Union Pacific's good-faith compliance with the federal speed regulation; it penalized Union Pacific for allegedly "put[ting] corporate profits before public safety"; and it focused heavily on Union Pacific's alleged litigation misconduct in justifying the $25 million sanction. This type of reasoning has persisted even after *State Farm* and deprives the reprehensibility guidepost of any constraining force in cases involving physical harm, opening the door to arbitrary and excessive punitive damage awards. This Court's guidance is needed to reinforce and clarify that a defendant's reasonable belief that its conduct is lawful—for example, as reflected in its compliance with federal safety standards—is highly relevant to the reprehensibility analysis, and that a corporation does not act maliciously simply because it sought to make a profit or because its product or service caused physical injury.

The decision below further contradicts *State Farm* by misapplying the ratio guidepost. The Arkansas Supreme Court is not alone in this regard: many courts, including courts that were specifically directed to reconsider cases in light of *State Farm*, have ignored this Court's holding that where "compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." 538 U.S. at 425. Faithful enforcement of the ratio guidepost is particularly important in product liability cases, where the

compensatory damage awards are often substantial, yet the defendant's level of reprehensibility is low. This Court should grant review to reinforce and clarify that the 1:1 ratio is a meaningful limitation on punitive damage awards that should not be ignored as a matter of course as the Arkansas Supreme Court did here, and as most courts have been doing since the day the Court announced its decision in *State Farm*.

ARGUMENT

This case vividly demonstrates how many lower courts are disregarding or evading this Court's ruling in *State Farm*. The trend is particularly apparent in negligence cases involving personal injury, such as the case at bar. Whereas this Court's prior decisions involving due process challenges to punitive damage awards have involved intentional torts causing economic injury such as fraud (*Gore*), unfair competition (*Cooper Industries*), and bad-faith failure to settle (*State Farm*), this case alleges negligence causing physical harm. *See* Pet. App. 1a. As Justice Kennedy recognized in *TXO Production Corp. v. Alliance Resources Corp.*, punitive damages that would be appropriate in the context of an intentional tort may not be appropriate in "a case of negligence [or] strict liability." 509 U.S. 443, 468 (1993) (Kennedy, J., concurring); *see also Daka, Inc. v. McCrae*, 839 A.2d 682, 701 n.24 (D.C. 2003) (applying *State Farm* and noting that negligence is "a degree of culpability ordinarily insufficient to support punitive damages at all").

Moreover, this case occurs against the backdrop of a heavily regulated industry. The Federal Railroad Administration—the federal agency mandated by law with ensuring rail safety—has specifically recognized that complex judgments as to what constitutes a "safe" grade crossing is best left to the judgment of federal regulators rather than the *ad hoc* determinations of state juries. The agency has explained that allowing juries to second-guess federal safety judgments through civil damage awards would lead to "misallocation of scarce resources" and would pressure railroads to install safety systems "not where research and data indicate they

will do the most good, but where a judge or jury determined, after the fact, that such a system should have been installed." *Selection and Installation of Grade Crossing Warning Systems*, 60 Fed. Reg. 11,649, 11,651 (Mar. 2, 1995).

This case thus presents the Court with an excellent opportunity to resolve important questions concerning the proper application of *State Farm* and *Gore* in the context of a negligence case involving personal injury. As evidenced by the significant number of massive punishments juries have returned in recent years in product liability cases—including cases where the product is subject to a thorough scheme of federal regulation—these issues are recurring with increasing frequency, and guidance from this Court is needed.

I. THE ARKANSAS COURT MISAPPLIED THE REPREHENSIBILITY GUIDEPOST

The lower court's application of the reprehensibility guidepost cannot be reconciled with *State Farm* or *Gore*. Although PLAC agrees with Union Pacific that the court's analysis was flawed in many respects, this brief addresses three aspects of the ruling that often arise in product liability cases and are of particular importance to PLAC's members.

A. Union Pacific's Compliance With The Federal Speed Regulations Is Highly Relevant To The Reprehensibility Analysis

Plaintiffs' complaint alleged that Union Pacific acted negligently by operating its train "at an excessive speed for the conditions." Pet. App. 2a. Specifically, plaintiffs contended that Union Pacific "failed to issue a 'slow order' calling for a speed restriction over that rail crossing." *Id.* at 4a. Although a federal track inspector testified that the track in question was "Class 4" track safe for travel up to 60 miles per hour (Pet. at 4; 49 C.F.R. § 213.9(a))—and although it was undisputed that the train was traveling slower than 60 miles per hour at the time of the collision (Pet. at 4)—the trial court permitted the jury to punish Union Pacific under Arkansas law for failing to operate its train at a slower speed.

PLAC agrees with Union Pacific that plaintiffs' state-law negligence claim is pre-empted under *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658 (1993). But at a minimum, the fact that Union Pacific's conduct conformed to an on-point federal standard is highly relevant to the reprehensibility inquiry under *Gore* and *State Farm* because it is an objective indicator of the company's good faith and the reasonableness of its conduct. The Arkansas Supreme Court erred by disregarding it.

This Court has long recognized that a defendant's reasonable belief that its conduct was lawful strongly mitigates reprehensibility, and in some cases may foreclose punitive damages altogether. For example, in *Southwestern Telegraph & Telephone Co. v. Danaher*, 238 U.S. 482, 490 (1915), the Court held that a $6,300 civil penalty violated due process where the defendant was "well justified in regarding [its conduct] as reasonable and in acting on that belief" *even assuming* that the defendant "should have known that the Supreme Court of the State . . . might hold the [conduct] unreasonable." The Court has also recognized this principle in the context of qualified immunity, explaining that "if officers of reasonable competence could disagree on th[e matter at] issue, immunity should be recognized." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). Indeed, any other rule would raise serious vagueness problems with regard to quasi-criminal punishments such as punitive damages. *See United States v. Lanier*, 520 U.S. 259, 270-71 (1997) (qualified immunity test is "simply the adaptation of the fair warning standard to give officials (and, ultimately, governments) the same protection from civil liability and its consequences that individuals have traditionally possessed in the face of vague criminal statutes"); *Colautti v. Franklin*, 439 U.S. 379, 401 (1979) (state abortion statute is unconstitutionally vague when the prohibited conduct depends on "a complex medical judgment about which experts can—and do—disagree"). *See also Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 499 (1982) (strict vagueness scrutiny applies to statute that imposes quasi-criminal penalties).

Compliance with a statutory standard is compelling evidence that a defendant possessed a reasonable belief that its conduct was lawful. In *Gore*, the jury found that the defendant's policy with respect to the disclosure of factory repairs constituted "'gross, oppressive, or malicious' fraud" even though that policy was consistent with statutes defining disclosure obligations in about 25 States. 517 U.S. at 565. Alabama had no such disclosure statute, and this Court "accept[ed] . . . the jury's finding that BMW suppressed a material fact which Alabama law obligated it to communicate." 517 U.S. at 579-80. Nevertheless, this Court recognized that BMW, in attempting to determine what it was required to disclose, "could reasonably rely on [other] state . . . statutes for guidance." *Id.* at 579. The Court also noted that the "diversity" of state laws "demonstrates that reasonable people may disagree about the value of a full disclosure requirement." *Id.* at 570. The Court concluded that a failure to disclose is "less reprehensible . . . when there is a good faith basis for believing that no duty to disclose exists," *id.* at 579-80, and when "a corporate executive could reasonably interpret" the law to allow nondisclosure. *Id.* at 578.

Where, as here, the standard is part of an extensive federal regulatory scheme, a defendant that relies on the standard is acting reasonably, and there is a serious question as to whether *any* punitive damages are constitutionally permissible. The facts of this case exemplify the sort of situation contemplated in *State Farm*, where the Court stated that "[i]t should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should *only* be awarded if the defendant's culpability, after having paid compensatory damages, is *so* reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence." 538 U.S. at 419 (emphases added).

Many of PLAC's members design and sell products that are subject to an extensive federal regulatory scheme. For example, automobile manufacturers design their vehicles to comply with the Federal Motor Vehicle Safety Standards, promulgated pursuant to the Motor Vehicle Safety Act, 49

U.S.C. § 30101 *et seq*. Even if a manufacturer can be held liable under state negligence law for designing a vehicle that fully complies with federal safety standards, the manufacturer's reliance on, and compliance with, the federal standards should negate any finding that the manufacturer acted reprehensibly. At a bare minimum, courts should regard such compliance as evidence that strongly mitigates the manufacturer's level of reprehensibility.

This due process principle is consistent with the approach followed by the many courts that have treated a defendant's good-faith reliance on federal safety standards as sufficient to bar punitive damages altogether. For example, in *Richards v. Michelin Tire Corp.*, 21 F.3d 1048, 1059 (11th Cir. 1994), the Eleventh Circuit reversed a punitive damage award against a tire manufacturer because "the record demonstrates that [the manufacturer] complied with all requisite Federal Motor Vehicle Safety Standards" governing the challenged design. Similarly, in *Satcher v. Honda Motor Co.*, 52 F.3d 1311, 1316-17 (5th Cir. 1995), another product liability case, the court held that punitive damages were barred where no government agency had ever required the design feature plaintiff claimed the defendant should have utilized. *See also Chrysler Corp. v. Wolmer*, 499 So. 2d 823, 825 (Fla. 1986) (punitive damages impermissible where manufacturer complied with federal standards). As one of the leading torts treatises recognizes, "[i]n most contexts . . . compliance with a statutory standard should bar liability for punitive damages." W. Page Keeton, *et al.*, *Prosser and Keeton on the Law of Torts* § 36, at 233 n.41 (5th ed. 1984).

Many state codes reflect this principle by providing that a manufacturer's compliance with safety standards creates a presumption that the product is not even defective. *See, e.g.*, Fla. Stat. § 768.1256(1) (when a manufacturer complies with relevant federal regulations, "there is a rebuttable presumption that the product is not defective or unreasonably dangerous and the manufacturer or seller is not liable"); Ky. Rev. Stat. § 411.310(2) ("In any product liability action, it shall be presumed, until rebutted by a preponderance of evidence to

the contrary, that the product was not defective if the design, methods of manufacture, and testing conformed to the generally recognized and prevailing standards . . . .").

The Arkansas court's refusal to consider Union Pacific's reasonable, good-faith belief that its conduct was lawful, based (among other things) on its compliance with the federal speed standard, directly conflicts with *Gore* and *State Farm*. Even if *some* amount of punitive damages can be imposed because plaintiffs' witnesses disagree with Union Pacific and the federal government, the existence of grounds for reasonable people to disagree on this issue, and of strong objective indicators that Union Pacific's conduct was both lawful and reasonable, surely is relevant to the reprehensibility analysis, just as the state disclosure statutes were relevant to that issue in *Gore*.

Guidance from this Court is necessary because many lower courts, even in the wake of *State Farm*, persist in approving massive punitive damage awards based on the opinions of plaintiffs' litigation experts, even though reasonable people, reasonable experts, and the United States government can and do disagree with those opinions. For example, in *Buell-Wilson v. Ford Motor Co.*, No. GIC800836 (Cal. Super. Ct. Aug. 19, 2004), the court awarded $150 million ($75 million in punitive damages and $75 million in non-economic damages) on the basis of an alleged design defect in a vehicle, even though the vehicle fully complied with all federal safety standards and even though the verdict had been preceded by thirteen consecutive defense verdicts in other cases alleging the same defect. Similarly, in *Douglas v. DaimlerChrysler Corp.*, No. CV2001-019659 (Ariz. Super. Ct. July 2, 2004), the court upheld a $50 million punitive damage award against DaimlerChrysler on the basis of an allegedly "weak" seatback design that more than *tripled* federal strength requirements. Verdicts like these end up deterring conduct that is entirely lawful and even socially desirable, simply because it is not above criticism from paid litigation experts—or they end up deterring nothing, because they provide no rational way for product manufacturers to

distinguish in advance between conduct that will be punished and conduct that will not.

The problem is not confined to the automotive industry. In 1997, CSX Transportation ("CSXT") was assessed with $2.5 *billion* in punitive damages by a New Orleans jury in connection with a tank car fire that occurred after the car was left at CSXT's facility. CSXT's "reprehensible" conduct was its failure to discover that the tank car was leaking a combustible substance. In affirming a remitted $850 million award, the Louisiana Court of Appeal gave no weight to the undisputed evidence that CSXT's tank car inspection practices conformed with all federal and other legal requirements, were fully consistent with industry standards of good practice, had never resulted in a tank car accident at the facility except for the accident at issue, and that CSXT had been commended by the New Orleans City Council for its conduct in connection with the fire. *See In re New Orleans Train Car Leakage Fire Litig.*, 795 So. 2d 364, 373, 375 (La. Ct. App. 2001), *petition for cert. dismissed per stipulation*, Louisiana Supreme Court No. 2001-C-2485.

When government agencies have reached the same conclusion as the defendant, the degree of reprehensibility under *State Farm* (if reprehensibility exists at all) is necessarily very low. This Court should grant plenary review to clarify this important and undeniably recurring issue.

B. The Arkansas Court's "Profits Over Safety" Rationale Is Misguided

The Arkansas Supreme Court also punished Union Pacific because it allegedly implemented a "corporate policy . . . that put company profits before public safety." Pet. App. 30a. This flawed rationale is common in product liability cases, where courts often hold that a manufacturer should be punished because in designing its product it did not take every possible precaution to maximize safety.

Courts that follow this approach ignore precisely what the Arkansas court ignored in this case: corporate decisions often implicate tradeoffs and require an assessment of rela-

tive costs and benefits. In the context of train operation, the railroad must weigh the dangers associated with a given speed against the many benefits that flow from faster trains, including the faster carriage of passengers and consumer goods—benefits that flow to the public and society as a whole. The fact that an accident occurred does not automatically mean the train was traveling "too fast." If all trains traveled at 5 miles per hour, there would be fewer accidents, but the overall loss to commerce and society as a whole would outweigh the safety benefits. *Cf. United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (applying cost-benefit analysis in context of negligence inquiry).

The same tradeoffs occur in product design decisions. In designing a product, a manufacturer must balance the risks of a given design against the benefits in cost and utility. As the *Restatement* recognizes, "[s]ociety does not benefit from products that are excessively safe—for example, automobiles designed with maximum speeds of 20 miles per hour—any more than it benefits from products that are too risky." Restatement (Third) of Torts: Products Liability § 2 cmt. a (1998). The fact that a manufacturer could have struck the balance at a different point, and sacrificed cost or utility in order to incorporate an additional safety feature, should not subject the manufacturer to a massive punitive sanction if an accident occurs. Many products by their very nature pose risks of serious injury and death that cannot be materially reduced without significant cost to society in the form of increased prices, less convenience or utility, or even less safety in other circumstances. *See* Jane Spencer and Cynthia Crossen, *Why Do Americans Feel That Danger Lurks Everywhere? Fixation on Risk, Fed By Labs, Law and Media, Haunts The World's Safest Nation*, Wall St. J., Apr. 24, 2003, at A1 (noting that thousands of injuries were caused in 2001 by pillows, books, crayons, nails and electric Christmas decorations, among other products); *Corrosion Proof Fittings v. E.P.A.*, 947 F.2d 1201, 1223 n.23 (5th Cir. 1991) ("over the next 13 years, we can expect more than a dozen deaths from ingested *toothpicks*"). The decision as to which design

strikes the proper balance among competing interests is often complex and rests upon a "morass of conceptual, political and practical issues on which juries, courts, commentators and legislatures strongly disagree." David G. Owen, *Problems In Assessing Punitive Damages Against Manufacturers Of Defective Products*, 49 U. Chi. L. Rev. 1, 37 (1982).

Juries are often ill-suited to make these sorts of hindsight determinations in the context of individual cases involving tragic personal injuries, on the basis of a highly technical record and arcane and often conflicting opinion testimony from engineers and scientists. *See* W. Kip Viscusi, *Corporate Risk Analysis: A Reckless Act?*, 52 Stan. L. Rev. 547, 586-90 (2000) (noting that jurors often demonstrate bias against companies that engage in risk-safety balancing); Reid Hastie *et al.*, *Looking Backward in Punitive Judgments: 20-20 Vision?*, *in* Cass R. Sunstein *et al.*, *Punitive Damages: How Juries Decide* 96, 108 (2002) (concluding that "hindsight bias is almost inevitable when jurors make punitive damages decisions"). Such cases pose great danger that juries will "use their verdicts to express biases against big businesses." *Honda Motor Co. v. Oberg*, 512 U.S. 415, 431-32 (1994).[2]

Just as it is no answer to say that a manufacturer should be punished because its product caused injury, it is no answer to say that punishment is warranted because the corporation sought to make a profit. Pet. App. 30a. *All* businesses seek to make a profit, and the fact that a jury found a defendant to have struck the risk/safety balance at the wrong point does not automatically prove the existence of a "corporate policy [to] put company profits before public safety." *Id.* *See also*

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[2] Nor are courts necessarily well-suited to make such determinations either. *See* James A. Henderson, Jr., *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 Colum. L. Rev. 1531, 1534 (1973) ("courts are not suited to the task of establishing specific product safety standards in the course of applying general reasonableness tests to determine the adequacy of allegedly defective products"); James A. Henderson, Jr., *Design Defect Litigation Revisited*, 61 Cornell L. Rev. 541 (1976).

State Farm, 538 U.S. at 420 (rejecting as unconstitutional the punishment of a defendant for its "nationwide policies" rather than for the conduct directed toward the plaintiff). This Court should grant plenary review to clarify the proper application of the reprehensibility guidepost in the context of a case where the defendant's conduct was not intrinsically wrongful—as in the case of an intentional tort or a knowing violation of a statute—but at the very worst reflected a negligent misjudgment concerning the relative costs and benefits of the challenged course of conduct.

C. Union Pacific Was Improperly Punished For Its Alleged Litigation Misconduct

The Arkansas court erred, and further contradicted *State Farm*, by punishing Union Pacific for its purported litigation misconduct that had nothing to do with plaintiffs' injury. The court held the alleged misconduct directly relevant to the reprehensibility analysis and the amount of the punitive damage award. *See* Pet. App. 32a ("the record reflects that Union Pacific engaged in acts of affirmative misconduct after being notified of the accident and the lawsuit against it"); *id.* ("The evidence shows that Union Pacific intentionally destroyed track records and voice tapes.").

This rationale cannot be reconciled with *State Farm*, which holds that "[t]he reprehensibility guidepost does not permit courts to expand the scope of the case so that a defendant may be punished for any malfeasance." 538 U.S. at 424. Rather, this Court explained, a defendant may be punished only "for the conduct that harmed the plaintiff, not for being an unsavory individual or business." *Id.* at 423. In addition, because discovery misconduct may be addressed through the sanctioning provisions of the Federal Rules of Civil Procedure, permitting it to be considered for purposes of punitive damages raises the danger of duplicative punishments. *See State Farm*, 538 U.S. at 423 (emphasizing due process dangers of "the possibility of multiple punitive damages awards for the same conduct").

Here too, the Arkansas court's approach reflects a growing trend. In *Mathias v. Accor Economy Lodging, Inc.*, 347 F.3d 672, 677 (7th Cir. 2003), a decision that relied on *State Farm*, the Seventh Circuit emphasized the defendant's "great stubbornness with which it has defended [the] case" as a major justification for a large amount of punitive damages. And in the Utah Supreme Court's decision on remand in *State Farm* itself, the court punished State Farm based in large part on the "lack of remorse" and "callousness" the court supposedly discerned in State Farm's pleadings. *See Campbell v. State Farm*, 2004 WL 869188, *8 (Utah Apr. 23, 2004). As PLAC has shown in its *amicus* brief in support of State Farm's pending petition for certiorari, such an approach cannot be reconciled with the First Amendment's protection of free speech and the right to petition government. *See Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 547 (2001) (restrictions on the type of arguments attorneys may make in court "implicate[ ] central First Amendment concerns"); *NAACP v. Button*, 371 U.S. 415, 429 (1963) (First Amendment "protects vigorous advocacy"); PLAC Br. in *State Farm v. Campbell*, No. 04-116, at 5-14 (discussing authorities).

The Arkansas court's erroneous reliance on Union Pacific's alleged litigation misconduct provides another reason for this Court to grant review: to make clear that punitive damages may not be used to sanction a party's conduct in connection with court proceedings, or to deter a party from mounting a vigorous defense.

II. THIS COURT SHOULD GRANT REVIEW TO CLARIFY THAT A 9:1 RATIO IS *NOT* PRESUMPTIVELY CONSTITUTIONAL

A. The Ratio Requirement Is A Crucial Constitutional Protection

This Court's decision in *State Farm* reflected and enshrined the important constitutional principle that a punitive sanction must bear a reasonable relationship to the actual harm to the plaintiff caused by the defendant. *See* 538 U.S. at 424-28. The Court recognized that in *Pacific Mutual Life*

Insurance Co. v. Haslip, 499 U.S. 1, 23-24 (1991), it had concluded "that an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety." 538 U.S. at 425. The Court emphasized that it had "cited that 4-to-1 ratio again in *Gore*," and "further referenced a long legislative history, dating back over 700 years and going forward to today, providing for sanctions of double, treble, or quadruple damages to deter and punish." *Id.* (citing *Gore*, 517 U.S. at 581). Importantly, this Court held that in cases where "compensatory damages are substantial, then a lesser ratio, *perhaps only equal to compensatory damages*, can reach the outermost limit of the due process guarantee." 538 U.S. at 425 (emphasis added).

The Arkansas Supreme Court's ruling in this case cannot be reconciled with *State Farm*. The $5.1 million compensatory damage award was undeniably "substantial." *Cf. State Farm*, 538 U.S. at 426 (holding that a $1 million compensatory damage award "was substantial"). Yet the Arkansas court affirmed a punitive damage award that is nearly *five* times the compensatory award, relying on this Court's statement that "'single-digit multipliers are more likely to comport with due process.'" Pet. App. 33a (quoting *State Farm*, 538 U.S. at 425). The Arkansas court utterly ignored this Court's directive that in cases where the compensatory award is substantial, a 1:1 ratio may be the constitutional maximum.

This Court should grant certiorari and confirm that *State Farm* means what it says: although a 9:1 ratio may be the presumptive outermost constitutional limit, it is *not* the norm, and for cases such as this one, a 1:1 ratio (or something very close to it) may not be exceeded.

Indeed, in many cases, even a 1:1 ratio can result in an excessive and unconstitutional sanction. For example, awards of compensatory damages often include a large component of non-economic damages, such as awards for pain and suffering or emotional distress. As this Court recognized in *State Farm*, these types of non-economic damage awards are very similar to punitive damage awards in that they "con-

tain [a] punitive element," and "'[i]n many cases in which compensatory damages include an amount for emotional distress, such as humiliation or indignation aroused by the defendant's act, there is no clear line of demarcation between punishment and compensation and a verdict for a specified amount frequently includes elements of both.'" 538 U.S. at 426 (quoting Restatement (Second) of Torts § 908, cmt. c, p. 466 (1977)). Moreover, non-economic damages are often plagued by the same problems as punitive damages, such as inadequate guidance to juries, lack of objective criteria against which to measure outcomes, and the general absence of principled bases for judicial review—all of which leads to radically varying and arbitrary awards.

Here, a large portion of the compensatory damage award was intended to compensate the plaintiffs for non-economic harm. In closing argument, plaintiffs' counsel asserted that plaintiffs suffered only $2.6 million in economic harm, Tr. 6578-79, yet the jury—having been instructed that it could award damages "for any pain and suffering or mental anguish experienced in the past and reasonably certain to be experienced in the future" (Tr. 6550)—awarded $5.1 million in total compensatory damages in a general verdict. This is further evidence that the $25 million punitive damage award is grossly excessive and unconstitutional.

Other courts have similarly misapplied this aspect of *State Farm* or ignored it altogether. For example, in the Utah Supreme Court's decision on remand in *State Farm* itself, the court held that the presence of non-economic damages actually requires a *larger* award because "conduct which causes $1 million of emotional distress and humiliation is markedly more egregious than conduct which results in $1 million of economic harm." *See* 2004 WL 869188, at *9.

The ratio requirement is particularly important in product liability cases, where juries frequently award large amounts of compensatory damages—often containing a substantial non-economic component—so that even a 1:1 ratio can result in a severe and unconstitutional sanction. *See, e.g.*,

Buell-Wilson v. Ford Motor Co. (upholding $75,000,000 in non-economic damages and a $75,000,000 punitive damage award even though the vehicle design complied with government safety standards and industry custom). Moreover, in many such cases the defendant's level of reprehensibility is low: the alleged defect is not readily apparent, and the claim involves a reasonable disagreement over a complex design judgment that the manufacturer made in good faith. A strong affirmation of the ratio principle will help ensure that this crucial constitutional protection is faithfully enforced.

B. Many Lower Courts Are Evading *State Farm*'s Ratio Requirement

This Court's guidance on the proper application of the ratio analysis is needed, as the decision below reflects a growing trend. Many lower courts have essentially disregarded *State Farm*'s holding that a 1:1 ratio is the presumptive limit in cases where compensatory damages are "substantial." As the Ninth Circuit recently declared, "*State Farm*'s 1:1 compensatory to punitive damages ratio is not binding, no matter how factually similar the cases may be." *Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1014-15 (9th Cir. 2004).

Like the court below, these courts have misinterpreted *State Farm*'s language that "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process," 538 U.S. at 425, as presumptively authorizing ratios of up to 9:1 in *any* case. For example, one court reasoned that "a red flag goes up" only if the award exceeds a 9:1 ratio, and suggested that any lower ratio "presumptively passes muster under the Due Process Clause." *McClain v. Metabolife Int'l, Inc.*, 259 F. Supp. 2d 1225, 1231 (N.D. Ala. 2003).

Ironically, perhaps the most blatant disregard of this Court's ratio holding is the Utah court's decision on remand in *State Farm*, where the court imposed a punitive damage award that is nine times the compensatory award—in defiance of this Court's admonition that "application of the *Gore*

guideposts to the facts of [*State Farm*] . . . likely would justify a punitive damages award at or near the amount of compensatory damages." 538 U.S. at 429. The Utah court deemed this Court's ratio holding "plausible as an abstract proposition," but not binding on remand because it "does not account for the circumstances of the compensatory damages award in this case." 2004 WL 869188, at *9. *See* PLAC Br. in *State Farm v. Campbell*, No. 04-116, at 14-20.

This trend is especially apparent in several recent decisions involving products. For example, in *White v. Ford Motor Co.*, No. 95-0279 (D. Nev. Sept. 1, 2004), the court approved a remitted $42 million punitive damage award that is *thirty* times the amount of compensatory damages. The court dismissed "*State Farm*'s single-digit guideline" as "not necessarily binding," concluding that Ford should have been "on notice" that "punitive judgments in Nevada courts may approach a 30:1 ratio." Slip op. at 43.

In *Williams v. Philip Morris, Inc.*, 92 P.3d 126 (Or. Ct. App. 2004), following a GVR in light of *State Farm*, the court upheld a 96:1 ratio and imposed a $79 million punitive damage award against Philip Morris. Even though the case was brought by the estate of a single plaintiff, the court upheld the award by theorizing that other individuals not before the court may have been harmed by the defendant's conduct—and that the punishment could be justified by reference to these hypothetical persons and imaginary harms. Thus, the court reasoned, because the defendant "inflicted potential harm on the members of the public in Oregon," a punitive award of $79 million was permissible, even though the plaintiff had been awarded only $820,000 in compensatory damages. *Id.* at 144. Acknowledging that the award vastly "exceed[s] a single-digit ratio," the court opined that "it is difficult to conceive of more reprehensible misconduct" and thus the "unique facts in this case . . . justify more than a single-digit award under the Due Process Clause." *Id.* at 145.

In *Douglas v. DaimlerChrysler Corp.*, the court affirmed a $50 million punitive damage award against DaimlerChrys-

ler—over 13 times the amount of the substantial $3.75 million compensatory damage award—for a purported design defect in a Dodge Ram truck. Relying on the interpretation offered in a law review article by a plaintiff's attorney rather than this Court's plain language, the Arizona court held that "contrary to reports, [*State Farm*] does not require that punitive damages be no more than nine times greater than compensatory." Slip op. at 5. Moreover, the court held that for purposes of the ratio analysis, the "denominator"—*i.e.*, the baseline amount of compensatory damages—should include the compensatory damages attributable to a nonparty defendant that was held 50 percent responsible for the harm. *Id.* at 1. In short, the court held that DaimlerChrysler could be punished for harm committed by another party—a result that violates *State Farm* and bedrock principles of due process.

In *Waddill v. Anchor Hocking, Inc.*, 78 P.3d 570 (Or. Ct. App. 2003), the plaintiff was injured when her fishbowl shattered. She sued the manufacturer, and was awarded $100,000 in compensatory damages and $1 million in punitive damages. Following a GVR from this Court, the Oregon court declined to reduce the award to a 1:1 ratio, but rather held that "the maximum constitutionally permissible award in this case is four times the compensatory damages for which defendant is responsible." *Id.* at 576.

In *Bocci v. Key Pharmaceuticals, Inc.*, 76 P.3d 669 (Or. Ct. App. 2003), the court approved a 7:1 ratio in a product liability case following a GVR in light of *State Farm*. The court held that "[u]nder the circumstances of [the] case," it was "willing to approve a ratio in excess of the 4-to-1 ratio that apparently is something of a benchmark for the United States Supreme Court." *Id.* at 675.

Finally, in *Romo v. Ford Motor Co.*, 113 Cal. App. 4th 738 (Cal. Ct. App. 2003), another case GVR'd for reconsideration in light of *State Farm*, the California Court of Appeal held that a 5:1 ratio was appropriate in a defective design case, even though the compensatory damage awards of approximately $5 million were undeniably "substantial," and

even though a significant portion of the compensatory awards reflected non-economic harm. The court made clear that it did not consider itself "strictly constrained by the single-digit multiplier set forth in *State Farm*," 113 Cal. App. 4th at 763, let alone by this Court's holding that where "compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." 538 U.S. at 425.

This Court should grant review to confirm that, when compensatory damages are substantial, a 9:1 ratio is *not* presumptively constitutional, and a 1:1 ratio is the maximum due process permits.

CONCLUSION

For the foregoing reasons, this Court should grant Union Pacific's petition and schedule this case for plenary review.

Respectfully submitted.

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